IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al., Petitioners and Plaintiffs, v. **REBECCA ADDUCCI**, et al., Respondents and Defendants.	Case No. 2:17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

PROPONENT'S MOTION IN SUPPORT OF THEIR BRIEF PROPOSING A FRAMEWORK FOR A COMPETENCY EXAM FOR CLASS MEMBER WISAM IBRAHIM

This motion is being submitted pursuant to the Court's Order, ECF #210.

The basis for Proponent's brief is fully explained therein. For the reasons set forth in the motion, Proponents respectfully request that the Court provide the relief specified.

Dated: January 26, 2018 Respectfully submitted,

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USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

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Class Action

PROPONENT'S BRIEF PROPOSING A FRAMEWORK FOR A COMPETENCY EXAM FOR CLASS MEMBER WISAM IBRAHIM

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STATEMENT OF ISSUES PRESENTED

1. Whether *Hamama* class member Mr. Wisam Ibrahim is entitled to the right of full and meaningful participation in his removal and detention proceedings under The Immigration and Nationality Act , 8 U.S.C. 1229a(b)(4)(B)?

Proponent's Answer: Yes.

2. Whether Mr. Ibrahim is protected by Section 504 of the Rehabilitation Act of 1973 from being excluded on the basis of his medical condition from full and meaningful participation in his removal and detention hearings?

Proponent's Answer: Yes.

3. Whether Mr. Ibrahim is entitled to a determination of mental competency (and the "safeguards" that would follow from a determination of incompetency) under existing BIA precedent *Matter of M-A-M- (2011)*, *Matter of J-S-S- (2015)*, and *Matter of M-J-K-* (2016) and existing Executive Branch Department of Justice, Executive Office of Immigration Review, and Department of Homeland Security implementation policies?

Proponent's Answer: Yes.

4. Whether the existing BIA precedent and existing Executive Branch implementation policies were sufficient to ensure Mr. Ibrahim's ability to exercise his right under § 504 of the Rehabilitation Act to meaningful participation in his removal and detention proceedings?

Proponent's Answer: No.

5. Whether adoption by this Court of the systems for mental health screening and assessment in detention, information sharing by ICE, and judicial competency inquiries and forensic competency evaluations enacted in *Franco-Gonzalez v. Holder* would ensure that Mr. Ibrahim (as well as all *Hamama* class members) could exercise his right to meaningful participation under § 504 of the Rehabilitation Act?

Proponent's Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Mr. Ibrahim is entitled to meaningful participation in his removal proceedings.

The Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(4)(B)

The Rehabilitation Act of 1973, 29 U.S.C. § 794(a)

Meaningful participation requires either competence or qualified representation.

Franco-Gonzalez v. Holder, CV 10-02211 (C.D. CA, April 23, 2013)

Mr. Ibrahim is entitled to a competency determination and appropriate safeguards.

Franco-Gonzalez v. Holder, CV 10-02211 (C.D. CA, October 29, 2014)

Preponderance of the evidence is the correct standard for a judicial competency determination.

Matter of J-S-S-, 26 I&N Dec. 679 (BIA 2015)

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Proponent submits this brief in support of their Urgent Motion To Vacate Stipulated Order Lifting The Preliminary Injunction (ECF 87) For Wisam Ibrahim.

FACTUAL BACKGROUND

Proponent, Saeeb Ibrahem Mansy, is the father of *Hamama et. al v. Adducci et. al* class member Wisam Ibrahim. Mr. Ibrahim was born in Iraq on June 28, 1977. At the age of fifteen, Wisam immigrated to the United States with his family and was admitted as a Legal Permanent Resident. In 2001, Mr. Ibrahim was ordered removed by an Immigration Judge. Because the government was unable to remove him to Iraq, Mr. Ibrahim was released under order of supervision.

Sometime in 2004, Mr. Ibrahim was diagnosed with Paranoid Schizophrenia and Anxiety Disorder and was prescribed medications including Perphenazine and Clonazepam which he is required to take regularly. (ECF 207). Mr. Ibrahim's mental disorder has caused him to behave irrationally and erratically, sometimes violently, and has led him to develop a hostile and suspicious attitude toward those closest to him. On or about June 12, 2017, Mr. Ibrahim was arrested by ICE officers and placed in detention in Youngstown, Ohio. Although a certified *Hamama* class member, he did not seek to retain counsel or attempt to file a Motion to Reopen his prior removal proceedings, and refused to meet with an attorney retained by his family in July of 2017. On October 30, 2017, Mr. Ibrahim signed a stipulation for prompt removal to Iraq. (ECF 151-2). On November 20,

2017, this Honorable Court issued an order lifting the stay of removal for Mr. Wisam Ibrahim. Mr. Ibrahim's family was not informed of the signed stipulation, or of this Honorable Court's order lifting the stay for Mr. Ibrahim. Mr. Mansy learned of his son's imminent removal in a call from Mr. Ibrahim on or about January 15, 2018, (ECF 207), and again in a call from an ICE agent on or about January 17, 2018.

On Tuesday, January 23, 2018, Mr. Mansy filed an urgent motion to vacate this Honorable Court's order lifting the stay of removal for his son Mr. Ibrahim, arguing that Mr. Ibrahim's mental condition rendered him incompetent to waive his right to remain in the United States. (ECF 207). An emergency hearing was conducted and this Honorable Court issued a temporary stay and requested that Mr. Mansy submit a brief setting forth the standard and framework under which Ibrahim's competency would be determined. (ECF 210). Finally, we have learned most recently that Mr. Ibrahim may have changed his mind and no longer wishes to be removed to Iraq.

ARGUMENT

I. MR. WISAM IBRAHIM HAS A RIGHT TO FULL AND MEANINGFUL PARTICIPATION IN HIS REMOVAL PROCEEDINGS

The Immigration and Nationality Act (INA) affords the right to full participation of detainees in their removal and detention proceedings. Under the

INA, "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. 1229a(b)(4)(B). However, the INA does not include specific protections for mentally incompetent aliens, other than to require immigration judges to provide safeguards to protect the rights and privileges of an alien should the alien be unable to appear due to the alien's mental incompetence. 8 U.S.C. 1229a(b)(3).

The Rehabilitation Act of 1973, however, mandates that protections be afforded to incompetent detainees. The Act prescribes that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of [the] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

The question here is how to determine whether Mr. Ibrahim suffers from a mental impairment and whether that impairment would prevent Mr. Ibrahim from full participation in his proceedings absent adequate safeguards.

II. EXISTING IMMIGRATION LAW PROVIDES INADEQUATE PROTECTION OF THE RIGHT TO MEANINGFUL PARTICIPATION FOR INCOMPENTENT DETAINEES

The Board of Immigration Appeals (BIA) provides some framework, if limited, for determining an alien's mental competence. Primarily, the BIA has found that an alien is presumed to be competent to participate in removal proceedings, and that absent 'indicia of mental incompetence,' an immigration judge is under no obligation to analyze an alien's competency. *Matter of M-A-M-*, 25 I&N Dec. 474, 477 (BIA 2011).

Indicia of incompetency may include such things as the behavior of the alien, any history of medical illness from medical records, reports, or evaluations, or from criminal proceedings, or evidence from other sources such as schools. *Id.* at 479. Once 'indicia of incompetency' become apparent, an immigration judge must then take measures to determine whether a respondent is mentally competent to participate in proceedings. *Id.* at 480. Those measures *could* include a mental competency evaluation by mental health professional. *Id*. at 481. In making such determination, neither party has the burden of proof, but rather a general standard of preponderance of the evidence is to be followed by the immigration court. *Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015), citing *Mason el rel. Marson v. Vasquez*, 5 F.3d 1220 (9th Cir. 1993). The BIA has given immigration judges broad

discretion to determine which safeguards may be appropriate for a particular case. *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016).

However, the safeguards prescribed by the BIA appear to be inadequate under the circumstances, as many do not apply to Mr. Ibrahim's circumstance of signing a waiver while in detention. It is not known if the Department of Homeland Security was aware of his mental illness, or took any steps to ensure that Mr. Ibrahim's right to full and meaningful participation was protected. More adequate screening was therefore necessary to ensure that Mr. Ibrahim was mentally competent to sign a stipulation for prompt removal to Iraq and to meaningfully participate as a class member in the underlying class action.

III. EXISTING EXECUTIVE BRANCH POLICY IS ALSO INADEQUATE TO GUARANTEE MR. IBRAHIM'S RIGHT TO FULL AND MEANINGFUL PARTICIPATION IN HIS REMOVAL PROCEEDINGS.

Current Executive Branch policies do not require adequate in-detention screening for mental incompetence. On April 22, 2013, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, was released by DOJ.[1] The same day, ICE also issued a memorandum titled *Guidance for New Identification and Information-sharing Procedures Related to Unrepresented*

[1] https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf

Detainees with Serious Mental Disorders or Conditions.[2] This memo was a request for Enforcement and Removal Operations to "begin developing procedures to ensure that … all immigration detainees will be initially screened when they enter the facility and will receive a more thorough medical and mental health assessment within 14 days of their admission." (Id at 2). Also that day, EOIR announced a *Nationwide Policy to provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions*[3] to "begin implementation of a system that will accomplish" Competency Hearings and Mental Competency Examinations, and the availability of a Qualified Representative for an unrepresented detained alien who is not mentally competent to represent him- or herself. (*Id.*) In April of 2015, DOJ released the *Department Of Justice Open Government Progress Report.*[4] This report *again* focused solely on safeguards in immigration proceedings rather than in detention, and revealed that the new policies had only been implemented thus far for Immigration Judges in Arizona, California, and Washington – not nationwide. These new policy directives have still not been implemented in Michigan or Ohio, and have failed to ensure that Mr. Ibrahim is able to fully participate in his removal proceedings.

[2] https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf.
[3] http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf t
[4] https://www.justice.gov/open/department-justice-open-government-progress-report-april-2015 - eoir).

IV. MR. IBRAHIM'S RIGHTS TO MEANINGFUL PARTICIPATION IN HIS REMOVAL PROCEEDINGS UNDER 8 U.S.C. § 1229a(b)(4)(B) AND THE REHABILITATION ACT OF 1973 HAVE BEEN VIOLATED.

Mr. Ibrahim is protected under Section 504 of the Rehabilitation Act, as he can establish that: (1) he is a person with disabilities within the meaning of the Rehabilitation Act; (2) he was "otherwise qualified for the benefit or services sought"; (3) he was "denied the benefit or services solely by reason" of his disability; and (4) the entity to provide the benefit receives federal funding. 29 U.S.C. § 794(a); *See Franco-Gonzalez,* Order #592 at 6, quoting *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). There is a reason the Executive Branch policy directives were issued on April 22, 2013 and apply only to Immigration Courts under the jurisdiction of the U.S. District Court for the Central District of California. On April 23, 2013, that Court issued a Permanent Injunction (*Franco-Gonzalez v. Holder*, No. 10-02211, Dkt. No. 593, April 23, 2013) and an accompanying Order implementing that Permanent Injunction (*Franco-Gonzalez v. Holder*, No. 10-02211, Dkt. No. 592 (C.D. Cal. April 23, 2013) regarding a class of potentially incompetent detainees. The Court found that "the 'safeguards' set forth in *M-A-M-* are insufficient" and that "Plaintiffs are entitled to the reasonable accommodation of appointment of a Qualified Representative to assist them in their removal and detention proceedings under Section 504 of the Rehabilitation Act." (*Id*. at 17). The Court subsequently issued an additional Order in which it

clarified that "[n]othing in EOIR's nationwide policy is intended to negate or alter the obligations of EOIR under the orders of the Court in *Franco-Gonzalez v Holder*." (See *Franco-Gonzalez v. Holder*, No. 10-02211, Dkt. No. 786 (C.D. Cal. October 29, 2014). This subsequent Order required all ICE Detention Centers in its jurisdiction to implement new policies "with the purpose of accurately identifying "individuals who are or will be in DHS custody for immigration proceedings in California, Arizona and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in immigration proceedings, and who presently lack counsel in their immigration proceedings." (*Id.* at 2). The Court ordered implementation of a system including mental health screening of detainees upon arrival at detention facilities, mental health assessments, an Information Sharing System to provide relevant documents and information regarding detainees' mental health to Immigration Judges, and an Evaluation System that shall include Judicial Competency Inquiries, Forensic Competency Evaluations, and Competency Reviews. (See *Id.* 2-19).

CONCLUSION

This Court should issue an order requiring an immediate mental health assessment of Mr. Ibrahim while in detention. The factual information regarding his prior diagnoses of Paranoid Schizophrenia and Anxiety Disorder, his wildly

fluctuating statements about whether he wishes to be represented by counsel and whether or not he desires to be removed to Iraq, and his father's sworn declaration as to his mental health history clearly indicate that Mr. Ibrahim is exhibiting evidence of a serious mental disorder or condition.

There are three available frameworks for determining the standard for whether Mr. Ibrahim was competent to waive the stay of removal – the BIA precedent, the DOJ/EOIR guidelines, and the system required under *Franco-Gonzalez.* It is Proponent's position that neither the BIA standard "where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent," nor the EOIR policy guidelines regarding Judicial Competency Hearings are sufficient, as they omit critical mental health evaluations while in detention, and instead focus on Judicial determinations of legal competency in removal proceedings. The system set forth under *Franco-Gonzalez* is much more appropriate for an in-custody mental health assessment, and would be conducted by a qualified mental health professional familiar with diagnosing mental disorders such as Paranoid Schizophrenia, for example, which render a detainee incompetent to represent themselves in detention or removal proceedings.

Evaluation in this manner, while in ICE detention, is appropriate to ensure that Mr. Ibrahim is not left unrepresented, yet simultaneously incompetent to

represent himself on matters such as signing a waiver of a stay of removal – a clear violation of his right to full and meaningful participation.

Cost does not seem to be a factor, as all three available frameworks allocate the financial burden on the Defendants, and the *Franco-Gonzalez* system also expressly states that "the inconvenience or expense to defendants associated with obtaining a trained mental health professional at additional cost" is *not* an exigent circumstance that would circumvent the requirements of the order. (*Franco-Gonzalez*, Dkt. No. 786 at 18).

Proponent believes that the result of such a mental health assessment will be a determination that Mr. Ibrahim was not competent to waive his Stay of Removal. In order to ensure his ability to exercise his right to full and meaningful participation in his removal and bond proceedings, Mr. Ibrahim should then be afforded a Competency Hearing in front of an Immigration Judge. Here, the three available frameworks mostly converge and would each require a judicial determination on whether Mr. Ibrahim is competent to represent himself in immigration proceedings, or whether he must be afforded a Qualified Representative or Attorney.

Dated: January 26, 2018

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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